Inc.
Investigations & Hearings
(3)

8 October 1958

MEMORANDUM FOR THE RECORD

SUBJECT: Subpoena Duces Tecum

1. A subpoena duces tecum commands the person to whom it is directed to produce the books, papers, documents or other objects designated therein. Rule 17 of the Federal Rules of Criminal Procedure controls all subpoenas sought in federal criminal cases. It conforms substantially to Rule 45 of the Federal Rules of Civil Procedure. Section (c) of Rule 17 relates to the subpoena duces tecum and it reads as follows:

> "For Production of Documentary Evidence and of Objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys."

The subpoena does not necessarily require the person to whom it is addressed to testify with respect to the things produced.

2. A subpoena duces tecum must be reasonable and specific, otherwise a prompt motion to quash or modify the subpoena will be granted. An order of the court denying such a motion is not appealable. The last sentence in Rule 17(c) provides for a method by which the court may permit either side to inspect subpoenaed documents or objects prior to the trial under the supervision of the court. It was inserted in the interests of fairness and for the purpose of preventing delay during the trial particularly in cases where numerous documents may have been subpoenaed.[1]

3. When the Federal Rules of Criminal Procedure became effective in 1946, Rule 17(c) was considered by some authorities to have established a method of discovery which Rule 16 failed to do. Rule 16 requires documents to have belonged to the defendant or to have been obtained from him or others by seizure or by process. However, Judge Holtzoff, a recognized authority on the federal rules, in a 1949 district court ruling pointed out that in a criminal case, unlike in

1. 4 Barron and Holtzoff, Federal Practice and Procedure, Sec. 2044 (1951).

a civil action, a right of broad discovery does not exist.[2] "The purpose of [Rule 17(c)] is a limited one. It is to make it possible to require the production before the trial of documents subpoenaed for use at the trial. Its purpose is merely to shorten the trial. It is not intended as a discovery provision."

4. At one stage in the Alger Hiss case,[3] the court made clear that the provisions of Rule 17(c) were limited in scope. The defendant by a subpoena duces tecum sought to have produced and inspected before trial certain described papers which were the property of the Immigration and Naturalization Service and apparently were of a confidential nature. The government contended that production and inspection before trial would be unreasonable. The court ruled that:

> "To permit the subpoena and the ex parte order to stand would, it seems to the Court, set a precedent whereby defendants could promiscuously seek subpoenas under Rule 17(c) of the Federal Rules of Criminal Procedure . . . which the Clerk issues without question, and ex parte orders, for the production and inspection of confidential records, which either might not be relevant upon the trial or the use of which might become academic in view of the action taken by the Trial Court."

5. In the application of Rule 17(c) the courts have distinguished between a subpoena for the production of documents in a good faith effort to obtain admissable evidence and an effort to gain information about the opponents case. In the leading case interpreting Rule 17(c), Bowman Dairy Co. v. U.S.,[4] the Supreme Court opinion stated that the only requirement for a subpoena under Rule 17(c) is that a "good faith" effort be made to obtain evidence. Recognizing that the chief innovation of the Rule was to expedite a trial, the Court emphasized that the plain words of the Rule indicate that it established a more liberal policy for the production, inspection and use of materials at the trial. The court, however came out strongly against a subpoena issued not to produce evidentiary materials but rather for the purpose of a fishing expedition "to see what may turn up." A court, according to the decision, should be solicitous "to protect against disclosures of the identity of informants, and the method, manner and circumstances of the Government's acquisition of the materials." A court may control the use of Rule 17(c) by the power to rule on motions to quash or modify. Involved in the Bowman Dairy case were materials which were obtained by the Government by solicitation or voluntarily from third persons, and not documents belonging to the Government which included the work product of government employees. In short, there must be a showing of good cause to entitle the defendant to production and inspection of documents under Rule 17(c).

6. "Good cause" was interpreted in the District Court for the Southern District of New York in the case of United States v. Iozia[5] as requiring a showing that:

2. U.S. v. Maryland and Va. Milk Producers Assoc., D.C.D.C. 1949; 9 F.R.D. 509.
3. U.S. v. Hiss, D.C.N.Y. 1949; 9 F.R.D. 515.
4. 341 U.S. 214; 95 L. Ed. 879 (1951).
5. 13 F.R.D. 335 (1952).

"(1) the documents are evidentiary and relevant; (2) that they are not otherwise procurable by the defendant reasonably in advance of trial by the exercise of due diligence; (3) that the defendant cannot properly prepare for trail without such production and inspection in advance of trial and the failure to obtain such inspection may tend unreasonably to delay the trial; (4) that the application is made in good faith and is not intended as a general fishing expedition."

In passing on the issue of good cause, countervailing considerations might come into play according to the decision: "For example, it may become important to protect confidential sources of information and the method, manner and circumstances of the Government's acquisition of the materials." Judge Weinfeld in his opinion pointed out that cases and authorities requiring the Government either to disclose confidential information of aid to a defendant in resisting charges against him, or to risk termination of the prosecution are not to be extended in the absence of unusual circumstances, so as to require in advance of, and in preparation for, trial a disclosure to a defendant of information which may tend to impeach persons the Government may or may not call as witnesses. "Good cause" has become a key term used in connection with the requirements necessary for the issuance of a subpoena duces tecum under Rules 16 and 17(c).

7. Opinions on the applicability of Rules 16 and 17(c) have stressed the evidentiary requirement of the material being sought, and in U.S. v. Wider,[6] a district court judge ruled that where agency regulation and practice forbids release, a defendant's subpoena duces tecum seeking an FBI report was quashed. The court based its decision on the decision in U.S. v. Nugent[7] wherein the Supreme Court stated: "We think that the statutory scheme for review, within the selective service system . . . entitles them to no guarantee that the FBI reports must be produced for their inspection."

8. The question of what material can be given the defense in a criminal prosecution was brought up early in American judicial history. In the trial of Aaron Burr,[8] the defense was allowed a subpoena duces tecum to compel production of a letter in the custody of President Jefferson. Chief Justice Marshall, who presided at the trial, stated:

"If it be apparent that the papers are irrelative to the case, or that for state reasons, they cannot be introduced into the defense, the subpoena duces tecum would be useless. . . . /If/ they may be important in the defense, if they may be safely read at the trial, would it not be a blot in the page which records the judicial proceedings of this country, if, in a case of such import as this, the accused should be denied the use of them? . . . That there may be matter, the production of which the court would not require, is certain; but . . . that the accused ought, in some form, to have the benefit of it, if it were really essential to his defense, is a position which the court would very reluctantly deny."

6. D.C.E.D.N.Y. 1954; 117 F. Supp. 484.
7. 346 U.S. 1.
8. U.S. v. Burr, C.C. Va., 1807, 25 Fed. Cas. 187 No. 14694. U.S. v. Schneidermann, 106 F. Supp. 731.

The words of the Chief Justice are in line with the requirement of the Sixth Amendment that: "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor. . . ." This right extends to documentary evidence. However, Federal courts in criminal cases most often interpret the Federal rules to mean that materials subject to a subpoena duces tecum are limited to those materials subject to inspection by virtue of Rule 16.[9]

9. Judge Holtzoff in U.S. v. Carter[10] has adequately summed up what appears to be the prevailing view among federal court judges in cases where discovery is sought in criminal cases. He determined that there were six principles involved in the construction of Rule 17(c). They are as follows:

> "1. Discovery in criminal cases in the Federal courts is governed by Rule 16 of the Federal Rules of Criminal Procedure. Rule 17(c) is not a discovery rule but a device whereby a subpoena duces tecum in a criminal case may be made returnable prior to the trial, and the subpoenaed documents or objects made subject to inspection by counsel on the return day.
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> "2. Whether an application under Rule 17(c) should be granted is within the sound discretion of the trial court.
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> "3. Rule 17(c) is applicable only to such documents or objects as would be admissible in evidence at the trial, or which may be used for impeachment purposes.
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> "4. Rule 17(c) does not extend broadly to statements of witnesses, since such statements are not admissible in evidence. While they may be invoked for impeachment purposes, such use may be made only in the event that the witness testifies at the trial. The Government does not necessarily call at the trial all witnesses from whom it has obtained statements, or always decide in advance exactly what witnesses it will present, since this matter is frequently governed by the exigencies of the trial. Moreover, the Government is under no obligation to disclose the names of its witnesses in advance, except in capital cases.
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> "5. A written statement made and signed by the defendant should be subject to inspection under Rule 17(c). In fact, it has been the invariable practice of several judges of this court, including myself, to direct the United States Attorney, on application of defense counsel, to permit the latter to inspect prior to the trial any written statement signed by the defendant and in the possession of the Government. This course seems both sensible and fair.
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> "6. If a witness is called by the Government, any written statement signed by the witness in its possession should be made available to

9. U.S. v. Bennethum, U.S.D.C. D. Del. 1957; 21 F.R.D. 227.
10. 15 F.R.D. 367 (1954).

defense counsel prior to cross-examination, in order that it may be used for impeachment purposes, if need be. Fairness and justice obviously require this course. As a matter of fact, it has been uniformly pursued by several judges of this court, including myself. There is no reason, however, why such a statement should be examined in advance of the trial, since the witness may not eventually be called to testify."

10. Appended to this memorandum is a chart showing the type of information sought and the disposition of a random sample of cases involving Rules 16 and 17(c).[11]

[redacted]

STA

Office of General Counsel

Attachment

AT OGC [redacted] jem

✓Subject 14-3
Signer
Chrono

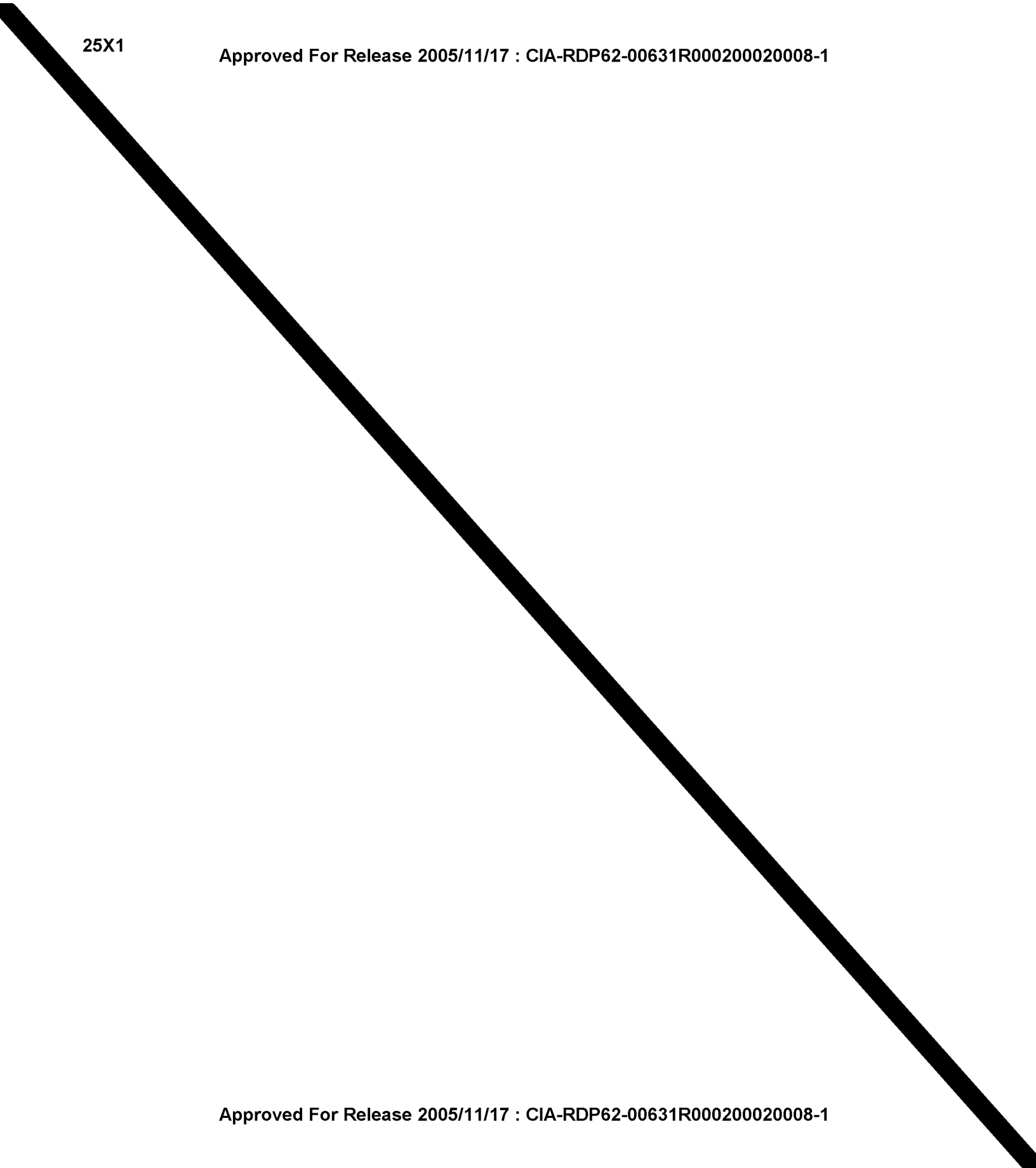
11. U.S. v. Peltz, D.C.S.D.N.Y. 1955; 18 F.R.D. 394.

Motions under Rules 16 and 17(c), Federal Rules of Criminal Procedure, for pre-trial discovery and inspection or production of statements of a defendant or other person.

Case	Items Sought	Rule Involved and Disposition	
		16	17(c)
United States v. Black, D.C.Ind. 1946, 6 F.R.D. 270;	Defendant's and other persons' statements to Government agents;	denied	
	F.B.I. reports;	denied	
	grand jury minutes	denied	
United States v. Chandler, D.C. Mass.1947, 7 F. R.D. 365;	Defendant's statement	denied	
United States v. Brumfield, D.C. La.1949, 85 F. Supp. 696;	Witnesses' statements	denied	denied
Shores v. United States, 8 Cir., 1949, 174 F.2d 838;	Defendant's confession	denied	
Fryer v. United States, 1953, 93 U.S.App.D.C. 34, 207 F.2d 134, certiorari denied, 1953, 346 U.S. 885, 74 S. Ct. 135, 98 L.Ed. 389;	Defendant's statements;		denied
	Statements volunteered to the Government by witnesses or third persons relating to the case		granted
United States v. Carter, D.C.D.C., 15 F.R.D. 367;	Statements of potential witnesses		denied
United States v. Cohen, D.C.S.D. N.Y.1953, 15 F. R.D. 269;	All books, records, documents and papers of defendants relative to the indictment;	denied	denied
	All written statements or transcripts of testimony and alleged confessions of defendant and statements of witnesses relative to the indictment	denied	denied

United States v. Pete, D.C.D.C. 1953, 111 F. Supp. 292;	Statements or confessions made by defendant to the police	denied	
United States v. Martel, D.C.N.D. N.Y.1954, 17 F. R.D. 326;	All statements made to Government agents relating to defendants and procured from some ten persons, including the three defendants;	denied	
	Suitcase seized from a defendant	denied	
United States v. Scully, D.C.S.D. N.Y.1954, 15 F. R.D. 402;	Defendant's statements		denied
United States v. Ward, D.C.S.D. N.Y.1954, 120 F. Supp. 57;	Income tax returns and books and records of third parties in the possession of the Government;		denied
	Statements made by third parties		denied
United States v. Peace, D.C.S.D. N.Y.1954, 16 F. R.D. 423;	Statement signed by defendant following his questioning by post-office inspectors at or about the time of his arrest;	granted	
	Written statement by a co-defendant		denied
United States v. Wider, D.C.E.D. N.Y.1954, 117 F. Supp. 484;	Minutes of F.B.I. hearing;	granted	
		not clear under which rule	
	F.B.I. report		denied
Schaffer v. United States, 5 Cir., 1955, 221 F.2d 17;	Statements signed by defendant, which were used as partial basis for confession dictated by an F.B.I. agent and signed by defendant, said confession being introduced into evidence by the Government	denied	
United States v. Brown, D.C.N.D. Ill.1955, 17 F.R. D. 286;	Statements of third persons		denied

United States v. Echeles, 7 Cir., 1955, 222 F.2d 144;	Statement of third person		denied
United States v. Klein, S.D.N.Y., April 12, 1955, C 144-144, C 145-147-unreported	Statements made by defendant to an Internal Revenue Agent, transcribed by a Government stenographer	granted	



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TRANSMITTAL SLIP

TO: JSW

ROOM NO.	BUILDING

REMARKS:

This is a useful study. I hope there will be more on evidentiary points we have encountered

Very good

FROM:

ROOM NO.	BUILDING	EXTENSION

FORM NO. 241 REPLACES FORM 36-8 (47)
WHICH MAY BE USED